91-432

Supreme Court, U.S.
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CASE NO.:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RANDOLPH MOORE
Petitioner,

v.

THE STATE OF NEVADA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) May the State of Nevada obtain a death sentence by presenting evidence that petitioner worshipped Satan, belonged to a coven, and conducted nontraditional religious rituals as aggravating factors at his penalty trial and by urging the jury to use petitioner's constitutionally protected religious beliefs, associations, and activities in determining whether to impose a death sentence?

PARTIES TO THE PROCEEDING

The parties to the proceedings before the Nevada Supreme Court were Petitioner RANDOLPH MOORE (appellant below) and Respondent People of the State of Nevada (respondent below). In the trial court (The Eighth Judicial District Court of the State of Nevada in and for the County of Clark), the parties were petitioner (then the defendant) and respondent (then the plaintiff).

The decision of the Nevada Supreme Court below consolidated the separate appeals of MOORE and co-defendant at trial Dale Edward Flanagan. The appeals of MOORE and Flanagan were separately filed, briefed and argued and the decisions consolidated without notice to MOORE or Flanagan by the Nevada Supreme Court.

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Petitioner RANDOLPH MOORE respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Nevada, entered on April 30, 1991.

OPINION BELOW

The opinion of the Nevada Supreme Court, affirming petitioner's sentence is reported at 810 P.2d 759 (Nev. 1991). The Court's opinion is reproduced in the Appendix hereto at A-1 through A-41. The opinion affirming in part and reversing in part the conviction and sentence was entered on May 18, 1988 and is reported at 754 P.2d 841 (Nev. 1988).

STATEMENT OF JURISDICTION

The Nevada Supreme Court entered a judgment affirming petitioner's death sentence on April 30, 1991. The Nevada Supreme Court entered a judgment

affirming the conviction but reversing the sentence on May 18, 1988 whereby the case was remanded to the trial court for further proceeding (a new penalty hearing). The sentence and conviction of MOORE therefore did not become final until April 30, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a). This petition is timely filed. U.S. Sup. Ct. Rule 13.1.

STATUTES AND CONSTITUTIONAL AUTHORITIES INVOLVED

This petition raises issues that involve the First, Fifth, Eighth, and Fourteenth amendments to the United States Constitution, and Nevada Revised Statutes sections 175.552, 200.030, 200.033, and 200.035. Appendix at A-42 to A-53 contains a verbatim statement of

the Nevada authorities.

STATEMENT OF THE CASE

A. Procedural Summary

On December 18, 1985, a jury in the Eighth Judicial District Court in and for Clark County, Nevada convicted Petitioner of two counts of first degree murder, and one count each of the following: burglary, robbery with the use of a deadly weapon, conspiracy to commit murder, conspiracy to commit burglary, and conspiracy to commit robbery. Following a penalty trial, the jury returned death sentences for the first-degree murders, and a judgment was entered fixing petitioner's punishment at death by lethal injection. On appeal, the Nevada Supreme Court affirmed the convictions, but vacated the death sentences and remanded for a new penalty

hearing. Moore v. State, 754 P.2d 841 (Nev. 1988). At the penalty retrial, petitioner was again sentenced to death for the two murder counts. On appeal, the Nevada Supreme Court affirmed the sentences. Moore v. State, 810 P.2d 759 (Nev. 1991)

On June 24, 1991, the Eighth Judicial District Court issued a supplemental warrant, setting the week of July 15-21, 1991, for the execution of the death sentence. The execution has been stayed by the District Court pending application for certiorari to this Court and other post conviction proceedings.

B. Factual Summary

On November 5, 1984, Colleen and Carl Gordon, the grandparents of co-defendant Dale Flanagan, were shot to death in their Las Vegas, Nevada home.

The State charged petitioner and five other teenage companions with murdering the Gordons. In 1985, a jury convicted petitioner of murder, and sentenced him to death.[1] On appeal, the Nevada Supreme Court affirmed the convictions, reversed the death sentences, and ordered a second penalty trial.[2]

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[1] Petitioner's co-defendants were convicted on several charges and received varying punishments. One received four consecutive life without possibility of parole sentences. Once received four consecutive life with the possibility of parole sentences. One received two consecutive life with the possibility of parole sentences. One received five-years probation. Dale Flanagan, petitioner's co-defendant in the instant proceeding, was sentenced to death.

[2] The Nevada Supreme Court reversed the death sentences because of the cumulative effect of the prosecutorial misconduct during the penalty phase render the sentencing hearing fundamentally unfair. Moore v. State, 754 P.2d at 8451 and, Flanagan v. State, 754 P.2d at 840.

On July 10, 1989, petitioner's penalty retrial began in the Eighth judicial District Court. During pre-trial proceedings, petitioner and his co-defendant, Dale Flanagan, objected to the State's proposed introduction of evidence that they had been involved with occult activities, including "white magic," "black magic," and "devil worship," two years prior to the crimes for which they were convicted.[3] Trial Transcript (Tr. T.) 140. In particular, petitioner raised constitutional objections to the State;s use of petitioner's personal beliefs as an aggravating circumstance, TR. T. 142-43, and made a continuing

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[3] The evidence introduced at trial indicated that petitioner had been involved in these activities while in high school and that the activities terminated at least one year prior to the commission of the crimes. TR. T. 835, 842.

objection to the State's "argument to give someone the death penalty because they have a certain kind of belief." TR T. 697-98.

In response, the State argued that although there was no evidence that suggested petitioner's beliefs in the occult had any role in the crimes for which he was convicted,, the evidence was relevant to the defendant's "character." Tr. T. 144.[4] The Court overruled petitioner's objections and permitted the introduction of the

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[4] The State has never argued that the petitioner's religious beliefs ' or activities were connected to the crimes. Petitioner's activities in the coven had ended over one year prior to the crimes. Tr. T. 835, 842. no evidence was presented that anyone committed illegal acts while a member of the coven. Moreover, apart from Dale Flanagan, petitioner's childhood friend, no member of the coven was ever implicated in the crime. Tr. T. 835

evidence as nonstatutory aggravating circumstances. Although the court recognized that the evidence was prejudicial, it concluded the evidence was admissible because it related to the "character" of the defendants:

> There is no question that there is a prejudicial effect. It does go to the character of the two defendants. Clearly, such would be inappropriate at the guilt phase depending on circumstances, but in a penalty phase the character is the issue. . . Tr.T 147.

At the penalty retrial, the only aggravating evidence introduce -- apart from the circumstances of the crime and the sentences of petitioner's co-defendants[5] -- was petitioner's alleged

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[5] The prosecutor, over objection, introduced the sentences received by petitioner's co-defendants and argued that "proportionality" required that petitioner and Dale Flanagan be sentenced to death. Tr. T. 1042-44.

involvement in occult activities. Throughout the proceedings, the prosecutor, recognizing the powerful effect of such "character" evidence, exhorted the jury to use it as the reason to impose a death sentence. In the prosecutor's opening statement he warned the jury about being mislead by Mr. Moore's appearance, asserting that there was a "dark and deviant side" behind the otherwise "ordinary" facade. Tr. T. 651. The prosecutor described the statutory aggravating factors that he would prove during the penalty trial and promised to teach the jury about the character of the two young men:

> "You will hear interestingly, fascinatingly about their use of devil worship...They created a coven, a real coven like you see in the movies . . . .Randy Moore was in command of the coven and he was known as white magic. White magic you will

> learn has to do with the intimidation of people, to make people do things that they wouldn't otherwise want to do. That's Randy Moore."

Most of the evidence presented illustrated that Flanagan, not MOORE was involved with "devil worship" and consisted of introducing a picture drawn by a friend that depicted a "black magic wizard" with the name "Dale" written on his hat and which the prosecutor claimed proved that Flanagan was involved with devil worship. State's Exhibit 119. The Court overruled petitioner's objection to the exhibit stating that the picture was relevant, and was "in keeping with the State's theory that there was [sic] satanic rituals and black magic or whatnot." Tr. T. 693.

For the most part the evidence of "devil worship" was directed to Flanagan,

although the argument of the prosecution painted MOORE with the same brush. Witness Tom Akers testified that Flanagan was "into devil worshiping" but that the extent of same was basically the use or tarot cards, and that Flanagan said that he could use his powers to push people toward heaven or hell. Akers offered no evidence against Moore that linked him to devil worship other than that Flanagan was a "black magic wizard."

Witness Wayne Wittig testified that he belonged to a coven with MOORE and Flanagan that ended in 1983. He described the coven as peaceful, trying to get the most out of life. The most violent thing ever done in the coven was the cutting of the thumb as an initiation procedure, like being blood brothers.

The coven started in the latter part of 1982 and was led by Flanagan and MOORE. Tr. T. 834. Wittig described the coven as a "satanic" gathering that used "black and white magic". Tr. T 834. As part of the initiation into the coven, the members drew a small amount of blood with a knife, and then burning it off with a candle flame. Tr. T 838.

Additional evidence that came before the jury was related only to Flanagan and consisted basically of a will Flanagan had written directed to MOORE that MOORE never saw and a drawing made by Akers that depicted Flanagan as a wizard. During the direct testimony of witness Wittig the prosecutor elicited the following testimony on this issue:

> "Q: So was Satan--in terms of religious concepts was Satan something that took the place of Christ?

A: As far as the coven was concerned, yes, sir.

Q: You would worship Satan and not Christ?

A: Right.

Q: You would worship the Antichrist?

A: Yes." Tr. T. 851

As a result of the admission of these prejudicial statements and the arguments of the prosecutor, petitioner in his case was forced to rebut the State's allegations by introducing testimony from witnesses that he in fact did not worship Satan. As related above, this consisted of establishing that the coven was little more a personal joke between the young friends and that no one really took the white magic--black magic powers seriously. Throughout the cases put on by MOORE and Flanagan the prosecutor would cross-examine witnesses

called by the Petitioner and ask them their opinion about MOORE'S religious beliefs. Thus the entire focus of the penalty hearing shifted away from aggravating and mitigating circumstances and onto the religious beliefs of Petitioner under the guise of character evidence.

The prosecutor's closing argument consisted largely of exhorting the jury to impose death because of Petitioner's alleged religious beliefs. During his first closing argument, the prosecutor urged the jury to consider Petitioner's religious beliefs:

> " And how about devil worship. You have read books, you have seen movies, you heard the terminology coven. It exists. They happen. Sort of tried to play down the whole deal but it happens and this coven, the evidence suggests, worshipped satan. It is as antichrist as it can get. It flies in the face of most people's deepest

> most dearest held beliefs and they warmly embraced it...I mean, think about that in terms of the character of the persons you are sentencing.
>
> Think about what they did and what they believed in." Tr. T. 1038-40

The prosecutor also imputed criminal proclivities to coven members with statements such as "[t]hey liked to carry guns and knives. Part of their daily lives. And this isn't NRA stuff. This is killing stuff. This is coven stuff." Tr. T 1035. All the evidence that had been presented at the hearing in fact showed that the coven did not engage in criminal activity and that the murders were in no way related to the coven.

The prosecutor continued with these themes during his second closing argument, and even though not supported by any evidence argued that the coven or devil worship was related to the crimes:

> "Were they devil worshippers? Yes. You know, on the devil worship thing. I hear all this minimizing...it truly is important in a person's character that he makes reference to as satan is my God.
>
> [I]f that were taken out of context and all by itself it would be bad enough.. We would all cock an eye and wonder about that person. But when you juxtapose that right next to and as part of a person who has committed a killing, it becomes real scary, something anyone trying to determine their punishments should be well aware of and concerned about." TR. T 1095.

During his final argument, Petitioner's counsel emphasized the mitigating factors presented during trial. These factors included Petitioner's youth at the time of the crime, his desire to help others, the abuse he suffered during his childhood, his lack of any criminal history, his work ethic and valor during his youth. Despite these mitigating factors, the

jury returned two death sentences.

REASONS FOR GRANTING THE WRIT

THE STATE OF NEVADA IMPROPERLY USED PETITIONER'S CONSTITUTIONALLY PROTECTED RELIGIOUS BELIEFS AND ACTIVITIES UNRELATED TO HIS CRIME AS AGGRAVATING FACTORS JUSTIFYING A DEATH SENTENCE.

Petitioner respectfully requests this Court grant certiorari to review whether a state may obtain a death sentence by using evidence of a defendant's constitutionally protected religious beliefs, associations, and activities that were unconnected to the crime. More specifically, the question presented in this case is whether the State of Nevada was constitutionally barred from presenting evidence that petitioner worshiped Satan, belonged to a coven, and conducted nontraditional religious rituals as aggravating factors

at his penalty trial.[6]

The procedures used at trial and condoned by the Nevada Supreme Court implicate substantial constitutional concerns. The State portrayed petitioner's unconventional and unpopular religious beliefs and activities as "deviant," and compared them negatively to more prevalent and positively-regarded

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[6] This petition presents issues similar to those raised by petitioner in Dawson v. Delaware, in which this Court granted certiorari on April 1, 1991. Dawson v. Delaware, ___ U.S. ___, 111 S. Ct. 1412 (1991). The question raised in Dawson is whether the State of Delaware could use evidence of the petitioner's racist associations and beliefs as aggravating circumstances in a death penalty sentencing trial, when the associations and beliefs were unrelated to the crimes. In Dawson, the defendant's identification with the white supremacist group Aryan Brotherhood, and his statements that he was "one of Satan's disciples," were used to persuade the sentencing jury to impose the death sentence.

religions. Tr. T. ___. Although these beliefs and activities were entirely unrelated to the crime, the prosecutor was permitted to argue to the jury that it should consider these beliefs and activities as evidence of petitioner's bad "character" and that they should be used as non-statutory aggravating factors in determining the appropriate sentence.

It should also be noted that all defendants at the guilt phase of the trial moved for severance at one time or another. The basis for MOORE'S request for severance was the prejudicial and otherwise inadmissible satanic evidence that co-defendants Luckett and McDowell would be presenting at trial in order to minimize their involvement and culpability in the murders. This evidence was not admissible by the State

but could be introduced by a co-defendant as exculpatory evidence. It is true that in determining whether to grant a severance, a Court must balance the possibility of prejudice to the defendant against the government's interest in judicial economy. United States v. Sudderth, 681 F. 2d 990 (5th Cir. 1982), however in this case the prejudicial impact of the evidence was obvious and the inadmissibility of the evidence should severance be granted obvious.

Luckett's defense was that MOORE had coerced him into involvement in the crime and in support of this defense presented witnesses who gave their opinions of MOORE as a violent person and recited prior bad acts in support thereof. This testimony also allowed the reference to the coven and wizardry to

come before the jury at the guilt phase of the trial. Later at he remanded penalty hearing the same trial court admitted that such evidence would not be admissible at guilt phase, stating:

> "Clearly, such would be inappropriate at the guilt phase depending on circumstances, but in a penalty phase the character is the issue...." Tr. T. 147

Prior to the guilt phase of the trial the State had pledged that it would not attempt to introduce evidence of gang activity and devil worship. Tr. T (I) 1367. Once the State rested, the prosecutors were able to sit back and watch defendants introduce the very evidence the State pledged not to even try to introduce. On no less than five occasions through three separate witnesses evidence of devil worship, satanic activities or the existence of a

coven came before the jury. Tr. T. (I) 2204, 2220, 2374, 2375, 2402. Thus not only did the subject satanic evidence come in at the remanded penalty hearing it was also considered by the jury at the guilt phase.

The Nevada Supreme Court concluded that evidence of petitioner's religious beliefs and associations was properly admitted because it was relevant to his "character." It relied on Nevada Revised Statute 175.552, which provides that during a penalty hearing "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant, or victim,[7] and on any other matter which

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[7] Nevada statutes provide that a person convicted of first degree murder is eligible for a death sentence only if the sentencing jury first finds the presence of one or more statutory aggravating

the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." 810 P.2d at 761 (emphasis added by the court). The Court rejected petitioner's constitutional objections to such a broad application of the statutory provisions:

> Appellants rely on Zant v. Stephens, 462 U.S. 862 (1983), in which the United States Supreme Court reiterated its earlier decisions prohibiting aggravating circumstances based on constitutionally

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circumstances listed in Nevada Revised Statutes 200.033. Nev. Rev. Stat. 200.030. If the jury finds no statutory aggravating factor present, the defendant may be sentenced to either life with the possibility of parole or live without the possibility of parole. Nev. Rev. Stat. 200.030(4). If the presence of one or more statutory aggravating circumstances is found, the jury must then weigh the statutory and non-statutory aggravating evidence against the mitigating evidence presented and return a death sentence unless the mitigating circumstances "outweigh" aggravating factors. Nev. Rev. Stat. 200.030(4)(a).

> impermissible factors such as religion. Id. at 885. See, e.g., Herndon v. Lowry, 301 U.S. 242 (1937). Here, however, the jury found four aggravating circumstances, none of which rested upon or involved constitutionally protected activities. Even assuming that the testimony regarding satanic worship involved constitutionally protected activity, Zant does not concern such character evidence. 810 P.2d at 761.

The Nevada Court's analysis is flawed in two fundamental respects. First, the court concluded that no constitutional violation occurred because none of the four statutory aggravating circumstances found by the jury involved constitutionally protected activities. The court's unstated and erroneous reasoning is that the constitutional limitations explicitly recognized in Zant v. Stephens, 462 U.S. 862 (1983), apply only to that aspect of the Nevada

sentencing process in which death penalty eligibility is determined by the finding of statutory aggravating circumstances. The court's reasoning further assumes that the Constitution places no limits on the matters to be considered in the weighing portion of the jury's deliberations -- in which jurors balance statutory and non-statutory aggravating factors against mitigating circumstances to determining whether to impose the death penalty. Second, the Nevada Court's reasoning that "Zant does not concern such character evidence" presented at petitioner's trial is unexplained and ignores this Court's opinions. 810 P.2d at 761. The "character" evidence that the State used to obtain petitioner's death sentence is precisely the type of constitutionally

protected activity referred to in Zant v. Stephens. These holdings depart so markedly from the teachings of this Court's cases as to require this Court's supervision through certiorari.

A. The Constitution Precludes a State from Using Protected Activity as an Aggravating Circumstance in a Death Penalty Sentencing Scheme.

Although the Constitution affords States wide latitude in designing death penalty statutes, states' sentencing procedures must sufficiently protect against the risk of arbitrary and capricious imposition of death sentences. See Gregg v. Georgia, 428 U.S. 153, 189 (1976) (jury's discretion must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action") (opinion of Stewart, Powell, and Stevens, J.J.). At a

minimum, a state's capital sentencing procedures "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (citations and footnotes omitted); see also California v. Brown, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring). A state's "capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" Godfrey, 446 U.S. at 427-28 (quoting Gregg, 428 U.S. at 188 (opinion of Stewart, Powell, and Stevens, J.J.) and Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J.,

concurring)); see also Lowenfeld v. Phelps, 484 U.S. 231, 244 (1988) ("To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of person eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant . . . .'") (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

The Constitution similarly restricts the manner in which a state performs this narrowing function. In holding that a defendant has a due process right to review aggravating evidence used to determine the death sentence, this Court recognized that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or

emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977); see also Johnson v. Mississippi, 486 U.S. 578, 585 (1988) (death sentencing decisions "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible'") (quoting Zant, 462 U.S. at 884-85).

Moreover, as this Court explicitly recognized in Zant v. Stephens, the Constitution prohibits the use of certain factors as aggravating circumstances:

> Nor has Georgia attached the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, cf. Herndon v. Lowry, 301 U.S. 242 (1937), or to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness. Cf. Miller v. Florida, 373 So. 2d 882, 885-886 (Fla. 1979).

> If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside.

462 U.S. at 885; see also Baldwin v. Alabama, 472 U.S. 372, 382 (1985).[8]

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[8] The importance of strictly limiting the information presented to a sentencing jury was concisely explained by Justice Marshall in his dissent in California v. Ramos, 463 U.S. 992, 1021-22 (1987):

> Since any factor considered by the jury may be decisive in its decision to sentence the defendant to death, Gardner v. Florida, [430 U.S. 349] at 359 (opinion of Stevens, J.), the jury clearly should not be permitted to consider just any factor. Rather, it should only be permitted 'to consider factors which can provide a principled basis for imposing a death sentence rather than a life sentence. See Zant v. Stephens, 462 U.S. 862, 885 (1983) (noting that jury may not consider race, religion, or political affiliation, and suggesting that factors which are truly mitigating cannot be the basis for imposing a death sentence).

The Nevada Supreme Court erroneously believed that Zant v. Stephen does not apply to any phase of the sentencing process once the jury concluded that statutory aggravating circumstances existed. Although Zant v. Stephens involved Georgia's death sentencing procedures that do not include a weighing process in determining the appropriate sentence, this Court's defense of constitucionally protected activity was not limited to that particular statutory scheme. Zant, 462 U.S at 885. This Court's jurisprudence consistently has recognized that state procedures governing a sentencer's decision during the weighing process may be subject to constitutional scrutiny. See, e.g., Parker v. Dugger, 498 U.S. ___, 111 S. Ct. 731, 738 (1991) (Constitution

requires independent reweighing of aggravating and mitigating evidence when aggravating factor held to be invalid); Mills v. Maryland, 486 U.S. 367, 375 (1988) (death sentence that may resulted from improper reading of instruction invalid); Johnson v. Mississippi, 486 U.S. 578, 586 (1988) (death sentence improperly based on invalid prior conviction); Caldwell v. Mississippi, 472 U.S. 320, 335-36 (1985) (Constitution does not permit exposing jury to irrelevant or misleading information).

The Nevada Supreme Court's conclusion that a state is free from constitutional scrutiny once an aggravating factor has been established misreads Zant v. Stephens and its progeny

and requires the granting of certiorari.[9]

B. Petitioner's Religious Beliefs and Associations Constitute Constitutionally Protected Activities.

The Nevada Supreme Court's conclusion that "Zant does not concern"

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[9] The principle that constitutionally protected beliefs and activities are impermissible sentencing factors also has been recognized in numerous non-capital cases. In United States v. Lemon, the court held that "[a} sentence based to any degree on constitutionally invalid." 23 F.2d 922, 938 (D.C. Cir. 1983). In United States v. Bakker, the Fourth Circuit reaffirmed that courts may not impose sentences based upon impermissible considerations, such as race, national origin, and religious beliefs. 925 F.2d 728 (4th Cir. 1991); see also United States v. Bangert, 645 F.2d 1297, 1308 (8th Cir.), cert. denied, 454 U.S. 860 (1981). Similarly , a defendant may not be punished for exercising his or her constitutional right to invoke the Fifth Amendment privilege against self-incrimination, United States v. Garcia, 544 F.2d 681, 685 (3d Cir. 1976); or for successfully appealing his or her conviction, North Carolina v. Pearce, 395 U.S. 711 (1969)

the "character evidence" used to obtain petitioner's death sentence ignores well-established jurisprudence. Although this Court did not delineate the full parameters of "constitutionally impermissible" factors, by any definition, the constitutional protection would encompass the religious beliefs, associations, and activities presented as aggravating evidence in petitioner's trial.

This Court consistently has protected an individual's First Amendment beliefs and activities from government regulation. See, e.g., Texas v. Johnson, ___ U.S. ___, 109 S. Ct. 2533, 2544 (1989). This Court's First Amendment jurisprudence includes a recognition that courts must be especially vigilant to protect the rights of persons who hold

nontraditional religious beliefs. As Justice O'Connor recently stated, "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility." Employment Division v. Smith, 494 U.S. ___, 108 L.Ed.2d 876, 901 (1990) (O'Connor, J., concurring in part).

The First Amendment contains two constraints on a state's right to infringe on an individual's religious beliefs. First, the Establishment Clause prohibits a state from favoring one eligion over another.[10] Second, states

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[10] A number of cases involving the Establishment Clause have demonstrated that state government action in this area will be carefully scrutinized because of the dangers to individual belief. Justice O'Connor, in her concurrence in Lynch v. Donnelly, 465 U.S. 668 (1984), expressed

may undertake no actions that compromise the free exercise of a person's religious beliefs.[11]

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the concern that government endorsement of religion "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Id. at 688 (O'Connor, J., concurring). This concern can be seen in this Court's overturning of a state statute providing for a moment of silent prayer, Wallace v. Jaffree, 472 U.S. 38 (1985), a state law prohibiting clergy members from holding elected office, McDaniel v. Paty, 435 U.S. 618 (1978), and a state requirement that public officeholders declare their belief in God, Torcaso v. Watkns, 367 U.S. 488 (1961)

[11] This Court's reading of the Free Exercise Clause of the First Amendment is particularly appropriate here. Starting with Cantwell v. Connecticut, 310 U.S. 296 (1940), this Court has held states to the constitutional requirement that they not inhibit individual religious practice through state law. Subsequent extensions of this doctrine have made it clear that states may not deny benefits to individuals based upon their religious beliefs. See Sherbert v. Verner, 374 U.S. 398 (1963). Most recently, this Court has found that states may not deny

The Nevada sentencing scheme offends both of these time-honored principles. The State introduced evidence at trial that petitioner "worship[ed] satan and not Christ," and exercised his beliefs by organizing a coven that used occult rituals and language that praised a Satanic way of life. Petitioner's religious beliefs, unconventional though they may be, are entitled to First Amendment protection. See, e.g., County of Allegheny v. American Civil Liberties Union, ___ U.S. ___, 109 S. Ct. 3086, 3098-99 (1989) (First Amendment protects religious beliefs regardless of

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unemployment compensation to individual claimants because their religious beliefs make it impossible or exceedingly difficult to comply with state statute. See Hobbie v. Unemployment Appeals Commission, 480 U.S. 136 (1987); Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707 (1981)

popularity of beliefs); United States v. Ballard, 322 U.S. 78, 87 (1944) ("The First Amendment does not select any one group or any one type of religion for preferred treatment.").

Moreover, the prosecutor used petitioner's religious beliefs, associations, and activities to obtain the death sentence. He argued that because petitioner did not worship the same God as most people, petitioner was more worthy of the death penalty; the State specifically asked the jury to see RANDOLPH MOORE in a negative light because he did not worship Jesus Christ. See Tr. T. 1038-40.[12]

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[12] This Court has ruled that beliefs and expression usually considered protected by the Constitution may be used as aggravating circumstances when they were the motivating factors for the crime. Barclay v. Florida, 463 U.S. 939, 949 (1983) (defendant's racist beliefs

The concern expressed by this Court in Zant v. Stephens, stems from the same roots from which developed the Court's own interpretations of the First Amendment. Zant mandates that a state not be allowed to use protected beliefs and activities in a prejudicial way against a defendant. Seen against the background of the Court's own interpretations of the First Amendment religion clauses, Nevada's use of petitioner's religious beliefs sends a dangerously different message. It sends a chilling message to those whose beliefs are outside the mainstream, and would

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properly considered as they were the basis for crime). In the instant case, the State never asserted that petitioner's religious beliefs were a motive for or were in any way connected to the crime.

allow the State to sanction certain religious beliefs, while condemning others. The Nevada Supreme Court's lack of concern for petitioner's constitutionally protected beliefs offend the purpose for which the First Amendment was enacted and contradict this Court's own holdings regarding First Amendment protection for religious beliefs. As the Seventh Circuit indicated in Collin v. Smith, 578 F.2d 1197, 1210 (7th Cir. 1978), "if [First Amendment] rights are to remain vital for all, they must protect not only those whom society deems acceptable."

The Constitution, by any reading, must stand for the principle that an individual cannot be executed because of his religious beliefs. The Nevada Supreme Court's unexplained reasoning in

allowing such evidence requires that this Court grant a writ of certiorari.[13]

CONCLUSION

For these reasons, this petition for certiorari should be granted. In the

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[13] The Nevada Supreme Court did not analyze whether the constitutional violation, if found, would require reversal of the death sentences. Although this Court has not defined the precise standard of review for such errors, under any standard of review, the constitutional violations here require reversal. In his dissent from the Nevada Supreme Court bench, Judge Springer describes the effect that evidence of Satan worship might have on residents of the Silver State:

> To label someone as, say, a communist, a sexual abuser of children, or even a loyal supporter of Saddam Hussein conjures such a 'prejudicial effect' in the minds of most of us as to render a fair judgment by a jury in a penalty hearing very difficult if not impossible. I believe that the antichrist devil-worship label used here probably had this kind of prejudicial effect." Flanagan v. State, 810 P.2d at 776 (Springer, J., dissenting).

alternative, the Court should defer consideration of this petition until disposition of Dawson v. Delaware.

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Dated: July 29, 1991

106 Nev., Advance Opinion 36

IN THE SUPREME COURT OF THE STATE OF NEVADA

DALE EDWARD FLANAGAN, APPELLANT, v. THE STATE OF NEVADA, RESPONDENT.

20383

RANDOLPH MOORE, APPELLANT, V. THE STATE OF NEVADA, RESPONDENT.

NO. 20483

April 30, 1991

Appeals from two sentences of death, consolidated for decision. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Affirmed.

Springer, J., dissented.

Lee Elizabeth McMahon, Las Vegas, for Appellant Dale Edward Flanagan.

Frankie Sue Del Papa, Attorney General, Carson City; *Rex Bell*, District Attorney, *James Tufteland*, Deputy District Attorney, and *Thomas L. Leen*, Deputy District Attorney, Clark County, for Respondent.

Schieck & Derke, Las Vegas, for Appellant Randolph Moore.

Frankie Sue Del Papa, Attorney General, Carson City; *Rex Bell*, District Attorney, *James Tufteland*, Deputy District Attorney, and *Daniel Seaton*, Deputy District Attorney, Clark County, for Respondent.

OPINION

By the Court, Young, J.:

In 1985, appellants Dale Flanagan and Randy Moore were convicted of murdering Flanagan's grandparents. Both Flanagan and Moore were sentenced to death and separately appealed to this court. We affirmed their convictions but reversed the sentences of death based on cumulative prosecutorial misconduct. *See* Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988) and Moore v. State, 104 Nev. 113, 754 P.2d 841 (1988). Following a joint retrial of the penalty phase in July 1989, Flanagan and Moore were again sentenced to die. Although separately briefed and argued on appeal, we have consolidated our decisions

in these cases due to the common issues presented. NRAP 3(b).

This case involves the shooting deaths of Flanagan's grandparents, Carl and Colleen Gordon. The Gordons were found dead on November 6, 1984, Carl having been shot seven times in the back and chest and Colleen having been shot three times in the head. On direct appeal, we found overwhelming evidence that Flanagan, Moore and four other co-defendants killed the Gordons so that Flanagan could obtain insurance proceeds and an inheritance under his grandparents' will. *Flanagan*, 104 Nev. at 107, 754 P.2d at 837.

At the second penalty hearing, the State called eight witnesses. In addition, Flanagan gave a brief unsworn statement to the jury in which he admitted

practicing white witchcraft.

The jury imposed sentences of death. On the special verdict form, the jury checked two mitigating circumstances: (1) the defendants' lack of significant history of prior criminal activity, and (2) "any other mitigating circumstances." In addition, the jury found four aggravating circumstances: that the murders were committed: (1) by defendants who knowingly created a great risk of death to more than one person; (2) while the defendants were engaged in the commission or attempted commission of a burglary; (3) while the defendants were engaged in the commission or attempted commission of a robbery; and (4) for the purpose of receiving money or any other thing of monetary value. Following

sentencing, these appeals were filed.[1]

Flanagan and Moore's Common Contentions

Appellants Flanagan and Moore first contend that the district court erred in admitting testimony regarding their involvement in satanic worship in 1982 when they were 17 years old. Appellants argue that the evidence concerning this activity was dubious and irrelevant. They

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[1] At sentencing on July 31, 1989, Flanagan waived his appeal of the death penalty and requested that he be executed on the date set. The district court found that Flanagan's waiver of his right to appeal was knowing and voluntary. Thereafter, defense counsel filed a designation of the record of the proceedings and, the next day, a notice of waiver of appeal.

Upon receipt of the notice of waiver of appeal, this court entered an order staying execution of Flanagan's death sentence and remanding to the district court for appointment of independent counsel to brief the question of whether Flanagan had validly waived his appeal rights. The district court appointed Lee Elizabeth McMahon who subsequently indicated that Flanagan did not wish to waive his appeal rights and be executed.

further argue that, even if the evidence is considered relevant, the district court should have excluded it because any probative value was substantially outweighed by the danger of unfair prejudice, of confusion of the issues and of misleading of the jury. *See* NRS 48.035(1). Appellants also assert that the prosecutor's argument regarding satanic worship inflamed the jury and diverted it from making its sentencing decision based on relevant evidence. Appellants contend that the admission of this evidence rendered the trial fundamentally unfair and the verdict arbitrary and capricious.

One of the State's witnesses, Thomas Akers, testified that he had seen Flanagan play with tarot cards and that Flanagan had told him he was "into" devil worship.

Akers also said that Flanagan told him he had the power "to push them [the Gordons] up or down, whatever he wanted." He further testified that he, Akers, had drawn a picture of a wizard and named it "Dale." A second State's witness, Wayne Wittig, testified that at age 16 he had been part of a seven-member "coven" led by Flanagan and Moore. Wittig stated that Flanagan represented black magic and Moore represented white magic, which meant that Flanagan was more the physical part of the coven, while Moore was more the mind-over-matter part. He also testified about an initiation ritual involving use of a knife to draw blood and running the blade through a candle flame "to create a centralness."

Appellants contend that the evidence of their belonging to a coven in 1982 was

irrelevant because there was no evidence or suggestion that this previous activity was a casual factor or otherwise related to the crimes committed in late 1984. In addition, appellants contend that the evidence was irrelevant because there was no evidence that the coven had a sinister purpose or was committed to evil. Moore also argues that the evidence was dubious and irrelevant because there was no evidence other than that he belonged to the coven. Relying on Woodson v. North Carolina, 428 U.S. 280 (1976), appellants maintain that the evidence was irrelevant because it was not part of their individual characters and the particular circumstances of the crime.

We conclude that this evidence was both relevant and properly admitted by the court. Under NRS 175.552, during a

penalty hearing "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim *and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible.*" (Emphasis added.) We have held that NRS 175.552 is not limited to the nine aggravating circumstances outlined in NRS 200.033. *See* Allen v. State, 99 Nev. 485, 488, 665 P.2d 238, 240 (1983); *see also*, Biondi v. State, 101 Nev. 252, 257, 699 P.2d 1062, 1065 (1985). Accordingly, the district court did not err in admitting the testimony about satanic worship.

Appellants also assert that the district court erred by allowing the State to use a constitutionally protected activity to seek the death penalty.

Appellants rely on Zant v. Stephens, 462 U.S. 862 91983), in which the United States Supreme Court reiterated its earlier decisions prohibiting aggravating circumstances based on constitutionally impermissible factors such as religion. *Id.* at 885. *See, e.g.*, Herndon v. Lowry, 301 U.S. 242 (1937). Here, however, the jury found four aggravating circumstances, none of which rested upon or involved constitutionally protected activities. Even assuming that the testimony regarding satanic worship involved constitutionally protected activity, *Zant* does not concern such character evidence.

Flanagan and Moore further contend that the district court's allowance of testimony regarding the sentences of the other four co-defendants violated their Eighth Amendment rights to have the jury

consider their individual characters and records and the circumstances of their particular crimes. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976). Appellants cite authority from several other jurisdictions in support of their argument that the prosection should not have been allowed to introduce and argue this evidence. *See, e.g.*, People v. Belmontes, 755 P.2d 310 (Cal. 1988).

At trial, the district court allowed testimony by one of the prosecutors from the original trial and penalty hearing. The prosecutor testified that co-defendant Johnny Ray Luckett had received four consecutive sentences of life without possibility of parole, and that co-defendant Ray McDowell had received four consecutive sentences of life with the possibility of parole.

We conclude that the district court did not err in allowing the testimony about the sentences of the other co-defendants. The evidence was admissible under NRS 175.552 as "any other matter which the court deems relevant...." Furthermore, the jury was instructed that it was not bound by the previous sentences. We believe that it was proper and helpful for the jury to consider the punishments imposed on the co-defendants. See State v. McKinney, 687 P.2d 570 (Idaho 1984).

Appellants next contend that Jury Instruction 15, which told the jury that "[a] verdict may never be influenced by sympathy, prejudice or public opinion" violated their Eighth Amendment rights because it undermined the jury's constitutionally mandated consideration of

mitigating evidence.

We have upheld virtually identical instructions in several other cases. *See* Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986); Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985); Biondi v. State, 101 Nev. 252, 699 P.2d 1062 (1985); Milligan v. State, 101 Nev. 627, 708 P.2d 289 (1985). In upholding a similar instruction in *Nevius,* we determined that the jury was fully advised "regarding the range of mitigating circumstances" it could consider. *Nevius,* 101 Nev. at 250, 699 P.2d at 1061.

As in *Nevius,* we hold that, because the penalty jury was properly instructed to consider any mitigating circumstances, the district court did not err instructing the jury that it should not be influenced by sympathy, prejudice or public opinion.

See Nevius, 101 Nev. at 251, 699 P.2d at 1061. Although appellants evidently urge this court to depart from our earlier decisions in *Howard, Nevius Biondi,* and *Milligan,* we decline to do so.

Flanagan's Remaining Contention

Flanagan also contends that Jury Instruction 8[2] violated his Eighth Amendment rights because it precluded the jury from considering and giving effect to relevant mitigating evidence. Relying on

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[2] Instruction 8 told the jury that:

> Murder of the First Degree may be mitigated by any of the following circumstances, even through the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime:
>
> (1) That defendant has no significant history of prior criminal activity.
>
> (2) The youth of the defendant at the time of the crime.
>
> (3) Any other mitigating circumstance.

several United States Supreme Court decisions, Flanagan argues that, although he was permitted to introduce mitigating evidence as constitutionally required, the instructions on mitigation, namely Instruction 8, had the effect of telling the jury not to consider relevant mitigating evidence. *See, e.g.*, Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. 2934 (1989). Therefore, Flanagan contends that Instruction 8 resulted in a death sentence which was arbitrary and capricious because it failed to properly guide the jury regarding mitigation.

Flanagan specifically contends that Instruction 8 was constitutionally deficient because the introductory language, "even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree

of the crime," would cause a reasonable juror to consider his mitigating evidence as irrelevant because it was unrelated to the crime itself. Next, Flanagan specifically contends that Instruction 8 was constitutionally defective because use of the "catch all" language in number 3 of the instruction, "any other mitigating evidence," failed to provide specific guidelines for considering mitigating evidence of his character and background.

However, our review of Instruction 8 persuades us that a reasonable juror would conclude that mitigation was not restricted to crime-related factors because it was stated that the mitigating circumstances did *not* have to constitute a defense or reduce the degree of the crime. Furthermore, the jury in fact found two of the three mitigating to exist. In

addition, the instructions as a whole adequately informed the jury of its right and duty to consider mitigating evidence. Finally, it is highly unlikely that a different outcome would have resulted from more specific instructions, given that the evidence of aggravating circumstances was overwhelming and clearly outweighed the mitigating circumstances found by the jury. Thus, we conclude that Instruction 8 did not violate the Eighth Amendment by impermissibly limiting the jury's consideration of mitigation to evidence related to the crime.

Moore's Remaining Contentions

Moore also contends that the district court erred in refusing his proposed jury instruction regarding mitigation. Citing Skipper v. South Carolina, 476 U.S. 1 (1986), Moore argues that the refusal

resulted in the jury not being advised that it could consider whatever it wanted to be a mitigating circumstance.

We have consistently held, however, that "it is not error to refuse to give an instruction when the law encompassed therein is substantially covered by another instruction given to the jury." Ford v. State, 99 Nev. 209, 211, 660 P.2d 992, 993 (1983). The other jury instructions, in particular Instructions 6 through 9, adequately informed the jury about the relevant law. These instructions told the jury that it was its duty to determine whether any mitigating or aggravating circumstances existed, and that it could only impose a sentence of death if the aggravating circumstances were established beyond a reasonable doubt and if no mitigating circumstances

outweighed the aggravating circumstances. The jury was apprised of the circumstances by which the crime could be aggravated or mitigated, including "any other mitigating circumstance." Therefore, we conclude that Moore's proposed instructions was properly refused because the information was adequately covered by the jury instructions given.

Additionally, Moore asserts that the district court erred by rejecting his proposed instruction in place of Instruction 6.[3] Moore contends that

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[3] Instruction 6 stated, in relevant part:

> The jury may impose a sentence of death only if it finds an aggravating circumstance has been established beyond a reasonable doubt, and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance found.

Moore's proposed instruction stated:

> The jury may impose a sentence

Instruction 6 failed to clarify that the burden rested on the State to prove that aggravating circumstances outweighed mitigating circumstances. Our review of the jury instructions, including Instruction 6, reveals that the instructions as a whole adequately informed the jury of the State's burden of proof. We conclude that the district court did not err in refusing Moore's proffered instruction.

Finally, Moore contends that the district court erred by rejecting his motion for severance prior to the second

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> of death only if it finds at least one aggravating circumstance has been established beyond a reasonable doubt and further finds that *the aggravating circumstance(s) outweigh the mitigating circumstance or circumstances found.*
>
> (Emphasis added.)

penalty hearing. However, this issue was decided in the first appeal and became the "law of the case." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975).

We conclude the sentences were not excessive considering the crimes and the characteristics of the defendants. Having found that appellants' contentions lack merit, we hereby affirm their death sentences.

MOWBRAY, C.J., and STEFFEN, J., concur.

ROSE, J., concurring:

The sentences imposed on the other participants in these murders should not have been received in evidence, nor should have evidence of Flanagan and Moore's prior involvement with a coven or Satan worship. These errors should not have been made, but I doubt that they

influenced the result in any substantial way. Accordingly, I would affirm Flanagan's and Moore's death sentences.

When Moore and Flanagan went to trial the second time, the cases of the four other men involved in this dastardly crime had been concluded in district court. Akers, who drove the vehicle to the victims' house, had entered a guilty plea to voluntary manslaughter pursuant to a plea bargain and received a sentence of five years, with the sentence suspended. He was placed on probation. Walsh pleaded guilty to two counts of first degree murder and was sentenced to two consecutive life sentences with possibility of parole. McDowell, the person who brought the .22 pistol to the crime scene and gave it to Flanagan, pleaded guilty to two counts of first

degree murder and received four consecutive sentences of life with the possibility of parole. Luckett went to trial, and the jury found him guilty of two counts of first degree murder. He was the person who entered the house with Moore and Flanagan and shot at the grandfather with the .22 pistol. He received a penalty of four consecutive life sentences without the possibility of parole.[1]

In closing argument, the prosecutor argued to the jury that when the penalties imposed on the other defendants were

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1 The State planned to introduce into evidence a large poster containing a list of all those involved in this crime and the sentences each had received to date. The defense objected and the court told the State to remove the sentences from the list because such demonstrative evidence may unduly influence the jury. however the court permitted the State to make reference in final argument to the sentences received by all those involved.

considered, equity and proportionality demanded that Moore and Flanagan be given the death penalty. In introducing the subject, the prosecutor stated:

> There is yet another reason to impose the death penalty. Fairness, Equity. I want you to think for a moment about the entire case, about all of the defendants and what has happened to them. Punishment should fit the crime.
>
> In this case, let's change it a little bit. The degree of punishment should be directed and influenced by the degree of involvement. The worse you are, the worse you ought to get. The better you are, the better you ought to get. Whatever those degrees are, juries like this, judges like that, need to find the most equitable solution so that everyone gets treated relatively fairly within the confines of their own case.

The prosecutor then recited the general involvement and penalty that had been assessed against each of the other four co-defendants. Then he turned his attention to the penalty that should be

assessed against Moore and Flanagan:

> That leaves us with these two. And when you get to life without the possibility four consecutive [the sentence entered against Luckett], that is as high as you can go. You can go no higher in terms of life sentences. There is one more upgrade, the death penalty.
>
> Now, Johnny Ray luckett took a shot at the grandfather and missed. These two people, we have already heard how devastating their actions are. They are killers. They are murderers, and as such, in terms of this equity argument that I am making now, they deserve no less than the death penalty. It is absolutely the only fair thing.

The penalty phase of a capital murder trial is conducted to assess the appropriate penalty that should be imposed on an individual found guilty of first degree murder. Consideration is given to the facts of the offense which usually have been presented in the guilt phase, the character and record of the defendant, and any mitigating or aggravating circumstances peculiar to this defendant.

It is a procedure conducted to tailor an individual penalty to the specific defendant and has little, if anything, to do with the penalty assessed against a co-defendant.

The United States Supreme Court recognized that in a capital case the penalty is to be designed for a specific defendant.

> We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. *The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.* A variety of flexible techniques -

> probation, parole, work furloughs, to name a few - and various post-conviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Lockett v. Ohio, 439 U.S. 586, 604-605 (1978) (fn. omitted, emphasis added).

A majority of the courts that have considered the issue have determined that the sentence imposed on a co-defendant is not admissible at the murder penalty hearing of a defendant. People v. Belmontes, 755 P.2d 310 (Cal. 1988); Coulter v. State, 438 So.2d 336 (Ala.Crim.App. 1982); State v. Williams, 292 S.E.2d 243 (N.C. (1982), *cert. denied,* 459 U.S. 1056 (1983); Brodgon v. Butler,

824 F.2d 338 (5th Cir. 1987).[2] The *Coulter* case well states the reasoning expressed in the cases espoused by the majority view:

> [A]n alleged accomplice's sentence is a product of the aggravating and mitigating circumstances applicable to the alleged accomplice. In the sentencing phase of the trial, the fact that an alleged accomplice did not receive the death penalty is no more relevant as a mitigating factor for the defendant than the fact that an alleged accomplice did receive the death penalty would be an aggravating circumstance against him. Simply put, an alleged accomplice's sentence has no bearing on the defendant's character or record and it is not a circumstance of the offense (italics omitted).

Coulter, supra, at 345-346.

The sentence a co-defendant received at a murder penalty hearing may have little relation to his culpability or involvement in the crime. The prosecutor

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[2] One jurisdiction has reached the contrary result. Brookings v. State, 495 So.2d 135 (Fla. 1986).

may offer an attractive deal to one of several defendants to secure critically necessary testimony even if the defendant was completely involved in the criminal activity (as may have happened in the case with Akers). And a jury might assess the least penalty because of a defendant's age or low IQ. On the other hand, a jury might impose the greatest penalty on a defendant whose involvement in the murder was marginal simply because of that defendant's substantial prior criminal record. There are many reasons why a specific penalty is assessed against a defendant that has nothing to do with that defendant's involvement in the specific crime. To me, this renders the penalty assessed against other defendants of only marginal relevance and it inserts a secondary issue into the penalty hearing

that detracts from the task at hand - determining the individualized penalty for this defendant.

The establishment of a rule of law is often a two-edged sword; it may help you in one case but work to your disadvantage in another. Informing the jury of the penalties assessed against the other defendants may well have helped the prosecutor in this case, but it will certainly work to the State's disadvantage in others. Every case cited in this concurring opinion deals with a defendant's attempt to introduce the penalty assessed against other defendants. I do not believe the rule established by the majority is the better one or the one that will best serve prosecutors in the future.

I also concur with the opinions

expressed by Justice Springer in concluding that the evidence of Satan worship and participation in a coven was far more prejudicial than probative. Neither Flanagan nor Moore was actively practicing Satanism or white magic at the time of the killings and the murders were not in any way related to a cult or ritualistic event. Evidence of a prior passing interest in Satanism coupled with the prosecutor's assertion that the defendants should be given the death penalty because they were "anti-Christ" injected prejudicial facts that should not have been in this trial.

In reviewing the penalty hearing, I come to the conclusion that the erroneous receipt of evidence and information would have had no substantial effect on Flanagan's or Moore's sentences. The

evidence against them was overwhelming and showed that these were heinous murders for profit committed against benevolent grandparents. Even without the evidence I find objectionable, I feel confident that they would have received the death penalty. However, we should not sanction the receipt of evidence at trialthat I believe to be clearly inadmissible.

Accordingly, I would affirm the first degree murder conviction and death sentences.

SPRINGER, J., dissenting:

There are two things wrong with the penalty hearing in this case. The first is that of allowing testimony about the sentences which were given to the other defendants involved in these homicides. I agree with Justice Rose's analysis of this error as expressed in his concurring

opinion; but I do not think that the error is harmless and would order a new penalty hearing on this ground. The second error in the penalty proceedings is the prosecution's persistent depiction of Moore and Flanagan as devil worshippers and "antichrist" and condemning them for their supposed "beliefs." Devil worship does not sit well with our juries; and I agree with the trial judge that there is no question that Flanagan and Moore suffered from the "prejudicial effect" inherent in the prosecution's reliance upon the supposed devil worship and demonic beliefs and practices of the defendants. I am convinced that once the prosecution successfully portrayed Flanagan and Moore as antichrist and as believers in Satanism, the "prejudicial effect" mentioned by the trial judge came

into operation; and the death penalty was inescapable, whatever else might have been brought out at the penalty hearing.

In arguing for the death penalty the prosecution condemned Flanagan and Moore for, in the words of the prosecutor, "what they believed in," saying that this was "as antiChrist as it can get" and "flies in the face of most people's deepest most dearest held beliefs." Since the prosecution conceded in its appellate briefing that there was no evidence of Moore's being a Satan worshipper, there should be no questions but that Moore was unfairly condemned by the prosection for unproven diabolical beliefs and practices. Moore is a murderer, true, but he is not, according to this record, antichrist, or a believer in devil worship. Further, Moore did not kill his own grandparents, as

Flanagan did. Moore is a very young man with no criminal record. The jury may very well not have returned the death penalty for Moore had it not been for Moore's being presented to the jury by the prosecution as being aligned with the devil and his evil designs.

Flanagan's case is different. He killed his own grandparents for money. For centuries and in a number of societies the murder of one's own parents or grandparents - parricide - has been condemned and punished with more severity than other homicides.[1] It is harder in

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[1] The crime of "parricide," murdering one's own parents or grandparents, has in all societies been considered to be more despicable than other homicides. According to Blackstone, under Roman law "parricide was punishable in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leather sack, with a live dog, a cock, a viper, and an ape, and so cast into the sea."

Flanagan's case than in Moore's to say that the "prejudicial effect" inherent in the devil-worship/antichrist portion of the prosecution's penalty case was so objectionable as to require a new penalty hearing; but I have two reasons for concluding that a new hearing should also be ordered for Flanagan on the basis of this error. The first reason is that condemning a person to death for what he or she professes or *believes in* clearly violates the first amendment of our federal constitution. in Baldwin v.

Blackstone, *Commentaries on the Laws of England,* Book IV, ch. 14 at. 202-03, Clarendon Press, Oxford (1769). Under the napoleonic Code of France parricide was punished by the murderer's being taken to the place of execution, without any clothes other than his shirt, barefooted, and with his head covered with a black veil. he was then exposed on the scaffold, while an officer of the court read his sentence to the spectators. His right hand was cut off, and he was then put to death.

Alabama, 472 U.S. 372, 382 (1985), the United States Supreme Court stated that, a death sentence based upon "consideration of factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, would violate the Constitution." Plainly, Flanagan's death sentence was based upon the jury's consideration of his supposed religious and group affiliations; thus under *Baldwin*, the penalty hearing contained prejudicial constitutional error.[2]

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[2] Even if I were not convinced Flanagan's constitutional rights were violated in this case, I would still postpone filing this opinion until the question could be resolved by the United State Supreme Court. on April 1, 1991, the Court granted certiorari in a case that presents virtually the same issues as this one. *See* Dawson v. Delaware, 581

Even if there were no constitutional error, I still see the matter as being governed by our case of Young v. State, 103 Nev. 233, 237-38, 737 P.2d 512, 515 (1987). In the *Young* case a "police expert" was brought into the penalty hearing to show that young was the member of a certain gang, which gang, according to the expert, would "do anything, including torture and killing." The prosecutorial syllogism was, then: The gang members torture and kill. Young was a gang member. Therefore, Young tortures and kills. We concluded in *Young* that such an argument was of a "highly dubious and inflammatory nature," and reduced the penalty assessed by what we considered to be an improperly influenced jury.

A.2d 1078 (1990), *cert. granted,* 59 U.S.L.W. 3672 (1991).

This case is similar to *Young* because the prosecutor brought in evidence that Moore and Flanagan had formerly been members, not of a gang but, rather, of some kind of teen-aged witches' "coven." Unlike the *Young* case, however, no witness was called here to tell the jury what a "coven" was, or to prove that coven members torture and kill people, or even that coven members are dedicated to carrying out the nefarious ends of the Devil. The absence of evidential support did not prevent the prosecutor from telling the jury that these particular former coven members, Flanagan and Moore, were antichrist, devil worshippers and opposed to the "dearest held beliefs" of most people. It seems to me that the evidence and argument presented by the prosecutor in this case are far more

"dubious" and far more "inflammatory" than they were in *Young*. If we were to follow the precedent set by this court in *Young*, we would have to do something about the prejudice inherent in this penalty hearing.

In this country and state certain labels tend to create virtually unreasonable prejudices. To label someone as, say, a communist, a sexual abuser of children, or even a loyal supporter of Saddam Hussein conjures such a "prejudicial effect" in the minds of most of us as to render a fair judgment by a jury in a penalty hearing very difficult if not impossible. I believe that the antichrist, devil-worship label used here probably had this kind of prejudicial effect on the jury.

I do not believe that these young men

got a fair penalty hearing, and I would order a new one.

NEVADA REVISED STATUTES, PROCEDURE IN CRIMINAL CASES

PENALTY HEARING FOR FIRST DEGREE MURDER

175.552. Requirement; jury; panel of judges; evidence.

Upon a finding that a defendant is guilty of murder of the first degree, the court shall conduct a separate penalty hearing to determine whether the defendant shall be sentenced to death or to life imprisonment with or without possibility of parole. The hearing shall be conducted in the trial court before the trial jury, or before a panel of three district judges if the trial was without a jury, as soon as practicable. In the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems

relevant to sentence, whether or not the evidence is ordinarily admissible. Evidence may be offered to refute hearsay matters. No evidence which was secured in violation of the Constitution of the United States of the constitution of the State of Nevada may be introduced. The state may introduce evidence of additional aggravating circumstances as set forth in NRS 200.033, other than the aggravated nature of the offense itself, only if it has been disclosed to the defendant before the commencement of the penalty hearing.

NEVADA REVISED STATUTES, CRIMES AGAINST THE PERSON

200.030. Degrees of murder; penalties.

1. Murder of the first degree is murder which is:

(a) Perpetrated by means of poison, lying in wait, torture or child abuse, or by any other kind of willful, deliberate and premeditated killing;

(b) Committed in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child or sexual molestation of a child under the age of 14 years; or

(c) Committed to avoid or prevent the lawful arrest of any person by a peace officer or to effect the escape of any person from legal custody.

2. Murder of the second degree is

all other kinds of murder.

3. The jury before whom any person indicted for murder is tried shall, if they find him guilty thereof, designate by their verdict whether he is guilty of murder of the first or second degree.

4. Every person convicted of murder of the first degree shall be punished:

(a) By death, only if one or m ore aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances.

(b) Otherwise, by imprisonment in the state prison for life with or without possibility of parole. if the penalty is fixed at life imprisonment with possibility of parole, eligibility for parole begins when a minimum of 10 years

has been served.

5. Every person convicted of murder of the second degree shall be punished by imprisonment in the state prison for life or for a definite term of not less than 5 years. Under either sentence, eligibility for parole begins when a minimum of 5 years has been served.

6. As used in this section:

(a) "Child abuse" means physical injury of a nonaccidental nature to a child under the age of 18 years;

(b) "Sexual abuse of a child" means any of the acts described in NRS 432.B100; and

(c) "Sexual molestation" means any willful and lewd or lascivious act, other that acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under

the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of the perpetrator or of the child.

NEVADA REVISED STATUTES, CRIMES AND PUNISHMENTS

200.033. Circumstances aggravating first degree murder.

The only circumstance by which murder of the first degree may be aggravated are:

1. The murder was committed by a person under sentence of imprisonment.

2. The murder was committed by a person who was previously convicted of another murder or of a felony involving the use or threat of violence to the person of another.

3. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, devise or course of action which would normally be hazardous to the lives of more than one person.

4. The murder was committed while

the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit, any robbery, sexual assault, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, and the person charged:

(a) Killed or attempted to kill the person murdered; or

(b) Knew or had reason to know that life would be taken or lethal force used.

6. The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value.

7. The murder was committed upon a peace officer or fireman who was killed while engaged in the performance of his official duty or because of an act

performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or fireman. For the purposes of this subsection, "peace officer" means sheriffs of counties and their deputies, marshals and policemen of cities and towns, the chief and agents of the investigation division of the department of motor vehicles and public safety, personnel of the Nevada highway patrol, and the director, deputy director, correctional officers and other employees of the department of prisons when carrying out the duties prescribed by the director of the department.

8. The murder involved torture, depravity of mind or the mutilation of the victim.

9. The murder was committed upon one

or more persons at random and without apparent motive.

NEVADA REVISED STATUTES, CRIMES AGAINST THE PERSON

200.035. Circumstances mitigating first degree murder.

Murder of the first degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense of reduce the degree of the crime:

1. The defendant has no significant history of prior criminal activity.

2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. The victim as a participant in the defendant's criminal conduct or consented to the act.

4. The defendant was an accomplice in a murder committed by another person

and his participation in the murder was relatively minor.

5. The defendant acted under duress or under the domination of another person.

6. The youth of the defendant at the time of the crime.

7. Any other mitigating circumstance.